No. 12-1205

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, APPELLANT

v.

SEAN FRANCIS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **PAGE**

STATUTES:

REGULATIONS:

LEGISLATIVE AUTHORITIES:

OTHER AUTHORITIES:

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STATEMENT OF JURISDICTION

This action arises under 18 U.S.C. 4248, and the district court had jurisdiction over our petition pursuant to 28 U.S.C. 1331. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF ISSUES

Title III of the Adam Walsh Act, codified at 18 U.S.C. 4247, 4248, provides for the civil commitment of sexually dangerous persons in the custody of the Bureau of Prisons. A sexually dangerous person is one who has committed prior acts of sexual violence or child molestation, and who suffers from a serious mental illness that would make it difficult for him to refrain from such acts in the future. The questions

presented in this case are:

1. Whether the respondent has committed prior acts of sexual violence within the meaning of 18 U.S.C. 4248, and

2. Whether respondent has a serious mental illness as a result of which he will have serious difficulty refraining from sexually violent acts in the future.

STATEMENT OF THE CASE

The United States initiated civil commitment proceedings against Sean Francis under the Adam Walsh Act, and sought to prove that (1) he has made hundreds of sexually explicit, violent threats by telephone, and (2) suffers from paraphilia characterized by a desire to make such threats. The district court declined to address the nature and extent of Francis's mental illness and instead concluded that he was unlikely to offend again; on the basis, the court ordered his release.[1]

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[1] Following the entry of judgment, Francis was released from custody pending this appeal, and remains on supervised release. This does not affect the jurisdiction of this court, however, or the district court's power to order Francis's commitment.

A prisoner must be in the custody of the Bureau of Prisons upon his certification as a sexually dangerous person, see 18 U.S.C. 4248(a), but nothing in the statute deprives this Court of the power to hear an appeal once the respondent has been released, or the district court of power to order his commitment should the government succeed in its appeal. The custody requirement of Section 4248(a) is a limitation on whom the government may seek to certify, not a limit on who the district court may commit upon the proper showing. The substantive source of a district court's authority to commit is 18 U.S.C. 4248(d), which requires that if a court "finds by clear and convincing evidence that the person is a sexually dangerous

STATEMENT OF FACTS

A. Statutory framework

Since 1949, federal law has provided a comprehensive framework for the treatment and commitment of various categories of mentally ill persons in federal custody. See Act of Sept. 7, 1949, Pub. L. No. 81-285, ch. 535, 63 Stat. 686 (codified originally at 18 U.S.C. 4244–48); Act of June 25, 1948, Pub. L. No. 80-772, ch. 313, 62 Stat. 855 (codified, as amended, 18 U.S.C. 4241-43). These categories include persons adjudged mentally incompetent to stand trial, 18 U.S.C. 4241; persons found not guilty by reason of insanity, 18 U.S.C. 4243; and persons determined to be suffering from a mental disease or defect before sentencing, 18 U.S.C. 4244, or while imprisoned, 18 U.S.C. 4245.

The Adam Walsh Act, Pub. L. No. 109-248, 120 Stat. 587, 587 (2006), amends and supplements existing civil commitment provisions to allow the federal government to seek court-ordered civil commitment of certain sexually dangerous persons in the government's custody. See Pub. L. No. 109-248, § 302, 120 Stat. 587, 619-22 (codified at 18 U.S.C. 4248 and amending 18 U.S.C. 4241, 4247).

Under the Act, the Attorney General, any person authorized by the Attorney

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person, the court shall commit the person to the custody of the Attorney General," and makes no mention of whether that person is in BOP custody at the time of the commitment order.

General, or the Director of the Bureau of Prisons may certify that an individual in custody is a "sexually dangerous person." 18 U.S.C. 4248(a). The certificate is transmitted to the district court, and the court must order a hearing to determine whether the person is a sexually dangerous person. *Ibid.* The filing of a certificate stays the release of the respondent pending completion of procedures required under the statute. *Ibid.* Those procedures include an opportunity for the district court to order a psychiatric or psychological examination, followed by the filing of a report with the court, and a mandatory district court hearing. 18 U.S.C. 4248(a)-(c). At the hearing, the respondent is entitled to representation, and counsel is appointed if necessary. 18 U.S.C. 4247(d). The respondent is given an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing. *Ibid.* The government bears the burden of demonstrating by clear and convincing evidence that a respondent is a sexually dangerous person. 18 U.S.C. 4248(d).

A sexually dangerous person is one who satisfies two conditions: he must have engaged or attempted to engage in sexually violent conduct or child molestation, and he must be suffering from "a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. 4247(a)(5), (6). If the government demonstrates both these elements by clear and convincing evidence, the certified

person is committed to the custody of the Attorney General. The Attorney General then must release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. 18 U.S.C. 4248(d). If no State will assume such responsibility, the Attorney General is required to place the person for treatment in a suitable facility, until "(1) such a State will assume such responsibility; or (2) the person's condition is such [that he can safely be released, either conditionally or unconditionally]; whichever is earlier." *Ibid.*

The director of a facility in which a sexually dangerous person is committed under Section 4248 must prepare annual reports concerning the mental condition of the person and containing recommendations concerning the need for his continued commitment. 18 U.S.C. 4247(e)(1)(B). If the director determines during the annual review, or at any other time, that a committed person is no longer sexually dangerous to others or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment, he must promptly file a certificate to that effect with the court. 18 U.S.C. 4248(d), (e). The court then must order the person's discharge or hold a hearing to determine whether the person should be released and, if so, the conditions of that release. 18 U.S.C. 4248(e). Additionally, a committed individual's counsel may "at any time during [his] commitment, file with the court that ordered the commitment a motion for a hearing

to determine whether the person should be discharged from [the] facility," provided that no court had ordered his commitment within the prior 180 days. 18 U.S.C. 4247(h).

B. Factual background and proceedings below

1. Francis's history of sexually obscene threats

The respondent, Sean Francis, has threatened hundreds of women in an obscene, sexually violent manner. He was first convicted of making threatening and obscene phone calls in 1999, at the age of 20. App. 515. Later that year, Francis was charged with making threatening interstate communications, based on evidence that he had again been calling women and making sexually obscene threats to them. App. 516. Francis was convicted and sentenced to 22 months imprisonment, and was released from federal custody in July 2001 on supervised release. *Ibid.* In late 2001, Francis's release was revoked when he admitted to his probation officer that he had made "approximately 50" more threatening and obscene phone calls following his release. App. 516. He was sentenced to 24 months imprisonment.

Shortly after his release in 2003, Francis was again arrested and again charged with making interstate threatening communications. App. 516. As detailed in the Presentence Investigation Report, Francis had been calling women on college campuses, asking them about their sexual behavior, and frightening them by telling them the personal information he knew about them. App. 25–27. He threatened to

rape the women he called, and in some cases, threatened additional violence if his victim contacted the police. App. 25. For example, he told one victim that "if you hang up the phone or get out of your bed I will rape you," and then demanded that she tell him details about her sex life. App. 26. He told another of his victims to masturbate and to insert a hairbrush into her vagina, and told her that "if I find out that you've told anybody, I'll make sure that you pay for it." App. 26. For these offenses, he was sentenced to an additional jail term of 70 months, to be followed by three years of supervised release. App. 25. While on release and participating in therapy, he admitted in a 2009 polygraph examination to multiple incidents of sexual assault and rape for which he had not previously been prosecuted. See, *e.g.*, App. 30–32.

Following his release, his supervision was again revoked in September 2009; he was sentenced to six months imprisonment to be followed by an additional year of supervised release. App. 517. Shortly before his term of imprisonment ended, the government certified him as sexually dangerous and stayed his release. *Ibid.*

2. Commitment proceedings and the evidentiary hearing

The government's certification of Francis as a sexually dangerous person was filed in February 2010. It explained his prior history and stated that he had been diagnosed with paraphilia—characterized in his case by a desire to make obscene, threatening phone calls and harm nonconsenting victims—as well as related

diagnoses of sexual sadism and antisocial personality disorder. App. 15–18.

At the evidentiary hearing, Francis conceded and elaborated upon much of his prior offense conduct. He testified that "I would tell them that I had been watching them, that I knew where they were and that I was going to rape you and kill you." App. 147. (He explained that "I didn't always threaten to rape and kill. Sometimes I just threatened to rape or sometimes I just threatened to kill." *Ibid.*) He testified that "I scared them. I definitely terrorized and scared them." App. 170. And he conceded, when asked: "Were the telephone calls obscene? If this is what you're getting at, they most certainly were." App. 211.

The government also introduced Francis's prior admissions of unprosecuted sexual assaults and rapes. These included Francis's admission that he raped a woman when he was in his early twenties. App. 30–32. In a video deposition, introduced into evidence at the hearing, a woman named Emily identified Francis as her rapist; the details of the attack that she provided closely matched the details that Francis had previously admitted. App. 30–32, 469. Francis recanted these admissions during the evidentiary hearing, characterizing them as fabrications that he invented for the purpose of remaining in sex offender treatment. *E.g.*, App. 471 ("Q. Now, her story is almost exactly the same as what you told the polygraph examiner in 2009, isn't it? A. I said stuff in 2009 for the purpose of being in sex offender treatment program. ... Sorry. I didn't rape that one.").

Four experts (two for the government, and two for Francis) testified with regard to respondent's mental condition. All four concluded that Francis met the diagnostic criteria for paraphilia, characterized in his case by urges to violently threaten nonconsenting victims, generally by telephone. Dr. Malinek (the government's first expert) testified that Francis suffered from paraphilia characterized by "nonconsent with prominent sadistic features." App. 305. Dr. Perkins, the government's other expert witness, concurred in her testimony, explaining that she had diagnosed Francis with "paraphilia not otherwise specified" characterized by "nonconsent and telephone scatalogia." App. 362. Francis's experts agreed with the diagnosis: Dr. Plaud testified that "the criteria for paraphilia" were satisfied by Francis. App. 390.[2] And Dr. Singer similarly testified that he diagnosed Francis with "a paraphilia [characterized by] telephone scatalogia, which is the sexual gratification of making obscene phone calls." App. 431–32.[3]

The experts disagreed primarily about the applicability of what are known as actuarial risk assessment tools, which are attempts to project reoffense rates by comparing a particular person to population studies. The government's experts

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[2] In his expert report, Dr. Plaud's assessment was more skeptical. App. 84. In his testimony, however, he specifically agreed that the diagnosis was the correct one (while holding out the possibility that it was susceptible to question, though he did not elaborate). App. 397–98.

[3] Singer testified that paraphilia did not qualify as a"serious" mental disorder under the Act, though he did not explain why in his testimony. App. 431–32.

testified that such tools were an appropriate, though not dispositive, means of assessing the effects of Francis's mental illness on his volition. His experts testified that they had little value in this case; one of Francis's experts did not believe that such tools are ever useful, App. 454, and another testified that he was not confident of their results when used to evaluate someone whose offenses were "non-contact." App. 421–22.

3. The district court's opinion ordering Francis's release

The district court dismissed the government's commitment petition in an order that largely adopted Francis's proposed findings of fact; however, the order modified and elaborated upon those findings, and was in certain crucial respects different from and inconsistent with them.

The court began by noting Francis's history of sexually violent threats, but declined to decide whether those threats qualified as "sexually violent conduct" under the Act. App. 537. The court concluded that at least "some" of Francis's admissions of hands-on offenses had been fabrications, but declined to resolve which of those that might be, or whether all of them were. App. 538. This was an instance of the district court's order deviating from Francis's proposed findings: those findings state that he had not committed *any* hands-on sex offenses, but the district court's order does not go that far. Compare App. 538 (district court order) with App. 532 (proposed findings).

The court also declined to make factual findings about whether Francis was mentally ill. Instead, the court concluded that while all agreed that Francis had suffered from paraphilia in the past, there was "a question" about whether the diagnosis "remained accurate." App. 538–39. The court's order did not elaborate upon this question or what its answer was; instead, the court simply concluded that Francis was unlikely to offend again, based on a six-month period of supervised release in which he had not been charged with making any obscene phone calls. App. 539. On that basis alone, the court ordered his release. App. 539–40.

SUMMARY OF ARGUMENT

Under the Adam Walsh Act, the government must prove by clear and convincing evidence that a respondent has committed previous acts of sexual violence or molestation and that he has a mental illness that will result in serious difficulty in refraining from future such acts. Francis's undisputed history of sexually obscene, violent threats qualifies as sexually violent conduct, and his diagnosis of paraphilia (in which all the experts at the hearing concurred) satisfies the requirement of a serious mental illness that impairs his volition. No more is required, and the district court should have entered an order committing Francis for treatment.

Instead, and without determining whether Franics suffers from a serious mental illness, the district court dismissed the government's petition on the sole ground that, in the court's view, he "would not have serious difficulty from refraining

from sexually violent conduct if released." App. 539. But without addressing the nature of Francis's mental condition, a court cannot determine the extent to which it would impair his volitional control: the Act speaks of commitment of those who have a "mental illness ... as a result of which he would have serious difficulty in refraining from sexually violent conduct." 18 U.S.C. 4247(a)(6). The two requirements are linked in the text, and in the case law. The Supreme Court has held "there must be proof of serious difficulty in controlling behavior," and this question is to be "viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself." *Kansas v. Crane*, 534 U.S. 407, 413 (2002). The district court's misunderstanding of the Act's mandates and the governing Supreme Court requirements render its ultimate judgment legally incorrect and clearly erroneous.

STANDARD OF REVIEW

The district court's legal conclusions are reviewed *de novo*. *United States v. Mehta*, 594 F.3d 277, 281 (4th Cir. 2010). Findings of fact are reviewed for clear error. *United States v. Harvey*, 532 F.3d 326, 336-37 (4th Cir. 2008).

ARGUMENT

A. Francis has engaged in sexually violent conduct

To be eligible for commitment under the Adam Walsh Act, a prisoner must have "engaged or attempted to engage in sexually violent conduct or child

molestation." 18 U.S.C. 4247(a)(5). As this Court has noted, the Bureau of Prison's "implementing regulations further define 'sexually violent conduct' and 'child molestation.'" *United States v. Timms*, 664 F.3d 436, 439 n.1 (4th Cir. 2012). The regulations explain that sexually violent conduct includes "any unlawful conduct of a sexual nature with another person" that involves (among other things) the "use or threatened use of force against the victim," or "threatening or placing the victim in fear that the victim, or any other person, will be harmed." 28 C.F.R. 549.92(a)-(b).[4]

Francis pleaded guilty to several counts of making interstate threatening communications. App. 516. In hundreds of calls, he threatened to rape or kill women if they did not obey his sexually explicit commands; one victim was told that, unless she inserted a hairbrush into her vagina while on the phone with him, he would kill her. App. 25–27. Francis himself had a keen understanding of the effect of this conduct on his victims: He testified at the hearing that "I scared them. I definitely terrorized and scared them." App. 170. Nor is there any doubt that the phone calls were sexually explicit: At another point in the hearing, Francis testified: "Were the

[4] This regulation was adopted through notice-and-comment rulemaking, pursuant to authority vested by statute in the Attorney General, see 5 U.S.C. 301, 28 U.S.C. 509, 510, and administratively delegated by him to the Director of Bureau of Prisons, see 28 C.F.R. 0.96. See also 73 Fed. Reg. 70278-02 (Federal Register notice of rule's adoption). It is thus entitled to deference unless plainly inconsistent with the statutory text, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005) ("*Brand X*"); its validity has not been challenged.

telephone calls obscene? If this is what you're getting at, they most certainly were." App. 211.

In addition to these undisputed threats, Francis has also admitted to many hands-on rapes and sexual assaults. These included Francis's admission that he raped a woman when he was in his early twenties. App. 30–32. In a video deposition, introduced into evidence at the hearing, a woman named Emily identified Francis as her rapist; the details that she provided closely matched the details that Francis had previously admitted. App. 30–32, 469. Francis recanted these admissions during the evidentiary hearing, characterizing them as fabrications that he invented for the purpose of remaining in sex offender treatment:

> Q. Now, her story is almost exactly the same as what you told the polygraph examiner in 2009, isn't it?
>
> A. I said stuff in 2009 for the purpose of being in sex offender treatment program. ... Sorry. I didn't rape that one.

App. 471.

Francis undoubtedly satisfies the statutory requirement that he must have committed prior acts of sexual violence. Whether or not Emily's testimony that Francis raped her is believed, the sexually violent and threatening nature of his many obscene telephone calls was not disputed by anyone, and was most graphically narrated by Francis himself in open court. Those calls were unlawful, involved another person, were of a sexual nature, and involved the threatened use of force

against the victim. They therefore qualified under BOP's unchallenged regulatory elaboration of the term "sexually violent conduct." 28 C.F.R. 549.92(a)-(b).

Whether respondent's obscene threatens constitute sexually violence within the meaning of the statute is a question of law and, not as the district court believed, an issue to be "debated by the experts called to testify." App. 537. The phrase is statutory one and it is for the agency, not witnesses at an evidentiary hearing, to reasonably interpret a term that it is charged with enforcing. See *Brand X*, 545 U.S. at 980 ("Filling these gaps ... involves difficult policy choices that agencies are better equipped to make than courts. If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.").

The court neither resolved the significance of respondent's past conduct nor the critical question of whether he suffers from a serious mental illness. As the Supreme Court has recognized in other civil commitment cases in particular, "previous instances of violent behavior are an important indicator of future violent tendencies." *Heller v. Doe*, 509 U.S. 312, 323 (1993), quoted in *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) (noting the Court's repeated "recognition" of this fact); see also *Schall v. Martin*, 467 U.S. 253, 279 (1984) (noting that when making "a prediction of future criminal conduct," one relevant factor is "prior record"). But the district court

made no findings about whether Francis had, in fact, committed the 2001 rape of Emily, as he had admitted; rather, the court simply stated:

> Notwithstanding, the Court notes that it found credible the testimony of Respondent that many if not all of the "victims" he described during his polygraph interview were either fabricated entirely or embellished for the purposes of remaining in a sex offender treatment program. Such a finding is supported in the record by the fact that although Respondent had admitted for purposes of sex offender treatment to committing up to fifty-seven contact sex offenses, only one potential victim has come forward and no charges have ever been filed against Respondent.

App. 538.[5]

The court did not further elaborate, evidently believing the case to be settled by its bare prediction of Francis's future behavior. As *Heller* and *Hendricks* make clear, however, prior acts are highly relevant to a predictive inquiry, and it was therefore error for the district court to refuse to make any findings about them—particularly where, as here, the question of Francis's earlier conduct dominated virtually the entire evidentiary hearing.

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[5] Francis's proposed findings of fact state that he has not committed any "hands-on" sex offenses, but it is unclear (given that the district court specifically addressed the matter differently in its order) to what extent the district court intended to adopt this finding. App. 532.

B. Paraphilia characterized by a compulsion to make obscene threats qualifies as a serious mental illness under the Act

The Act also requires that a person have a serious mental illness such that he experiences a lack of ability to control his behavior. All the experts diagnosed Francis as suffering from paraphilia, a widely recognized mental illness that the Supreme Court has identified as satisfying the "lack-of-control" requirement. See *Crane*, 534 U.S. at 414 (noting that pedophilia, a common species of paraphilia, "critically involves what a lay person might describe as a lack of control"). The district court nonetheless expressed doubts that the diagnosis was correct, declined to make *any* finding regarding mental illness, and then refused to commit Francis on the ground that he was, in the district court's view, unlikely to reoffend. This manner of analysis turns the statute on its head. The Act is specifically *not* (and could not, consistent with the Constitution, be) a scheme for the preventive detention of recidivists. Rather, it is a civil commitment scheme for the mentally ill. While ability to control behavior is relevant to the mental illness inquiry in the sense that the illness must have, as one of its symptoms, a decreased ability to control one's behavior, the question of recidivism is neither necessary nor sufficient under the statute to decide a person's eligibility for commitment.

Under the Act, a prisoner must have a "serious mental illness, abnormality, or disorder" to be eligible for commitment. 18 U.S.C. 4247(a)(6). The illness must be

one that impairs a prisoner's ability to control himself, reflecting the Supreme Court's holding to this effect in *Kansas v. Crane*, 534 U.S. 407 (2002). As the Act puts it, a prisoner's illness must impair his volition such that he has a "serious difficulty" refraining from future acts of sexual violence or child molestation. The Act does not define the phrase "serious mental illness, abnormality, or disorder," but the standard is substantively similar to the one used by Kansas and subsequently approved by the Supreme Court. See H.R. Rep. No. 109-218, pt. 1, at 29 (describing the Children's Safety Act of 2005, which became the Adam Walsh Act, as containing "commitment standards substantively similar to those approved by the Supreme Court in *Kansas v. Hendricks*, 521 U.S. 346 (1997), and *Kansas v. Crane*, 122 S. Ct. 867 (2002)").

Francis was diagnosed with paraphilia, a mental illness defined in the Diagnostic and Statistical Manual of Mental Disorders ("DSM")—a "commonly used reference book in the fields of psychiatry and psychology." *United States v. Carta*, 592 F.3d 34, 38 (1st Cir. 2010). Paraphilia was the category of mental illness at issue in both *Hendricks* and *Crane*. See *Hendricks*, 521 U.S. at 354-55 (discussing Hendricks's diagnosis of pedophilia, a paraphilia characterized by a sexual desire for children); *Crane*, 534 U.S. at 414–15 (same).) The DSM defines the "essential features" of a paraphilia as (1) "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors," that involve (2) "children or other nonconsenting persons," that (3) "occur over a period of at least 6 months," and (4) "cause clinically significant distress

or impairment in social, occupational, or other important areas of functioning." DSM, 522-23 (4th ed. 2000). The DSM lists, "as examples," ways in which paraphilia may manifest, one of which is "fixation on obscene phone calls." *Carta*, 592 F.3d at 40; see also DSM, at 532. (That fixation is sometimes more specifically referred to as "telephone scatalogia.")

The experts who examined Francis agreed that, on the basis of his fixation with obscene telephone calls, a paraphilia diagnosis was appropriate.[6] The Bureau's certification filed at the outset of this case reported a diagnosis of "Sexual Sadism and Paraphilia, Not Otherwise Specified (Telephone Scatalogia and Nonconsent)". App. 17. Dr. Malinek (the government's first expert) concurred that Francis suffered from paraphilia characterized by "nonconsent with prominent sadistic features." App. 305. Dr. Perkins, the government's other expert witness, concurred in her testimony, explaining that she had diagnosed Francis with "paraphilia not otherwise specified" characterized by "nonconsent and telephone scatalogia." App. 362. In addition, Francis's own experts concurred in the diagnosis: Dr. Plaud testified that "the criteria for paraphilia" were satisfied by Francis, App. 390,[7] as did Dr. Singer, who testified

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[6] The experts sometimes referred to "paraphilia NOS," which stands for "not otherwise specified." *E.g.*, App. 538. This is not a distinct diagnosis, but is simply a subcategory of paraphilia, an example of which is a fixation on obscene phone calls. See *Carta*, 592 F.3d at 41.

[7] As noted above, Dr. Plaud's expert report was more skeptical, App. 84, but he clarified in his testimony that the diagnosis was the correct one.

unequivocally that he diagnosed Francis with "a paraphilia [characterized by] telephone scatalogia, which is the sexual gratification of making obscene phone calls." App. 431–32.

Paraphilia, thus defined and as diagnosed here, is a serious mental illness, as the Act uses that term; an urge to make sexually violent threats by telephone clearly affects normal, healthy functioning and "affect[s] the emotional or volitional capacity [and] predisposes the person to commit sexually violent offenses." *Hendricks*, 521 U.S. at 352. Indeed, one of the criteria for a paraphilia diagnosis is that the individual's behavior, sexual urges, or fantasies cause "clinically significant distress or impairment in social, occupational, or other important areas of functioning." DSM, 522-23. And the First Circuit, in *Carta*, has already so held. 592 F.3d at 40–42.

It is also clear that Francis's paraphilia has affected his volition in the way the Supreme Court required in *Hendricks* and *Crane*.[8] The respondent in *Hendricks* had testified that the effect of his paraphilia was that "when he 'get[s] stressed out,' he 'can't control the urge' to molest children." 521 U.S. at 355. Francis's description of his own disease is strikingly similar: as he explained to a therapist in 2000, "I'd start dialing and I just couldn't hang up. I couldn't stop myself." App. 45. Francis has

[8] The Act's volitional impairment requirement simply codifies the Supreme Court's decisions in *Hendricks* and *Crane*, as this Court has recognized. *United States v. Hall*, 664 F.3d 456, 463–64 (4th Cir. 2012).

reported that after engaging in sexually explicit threats, he feels "guilty and sad," and has lamented that he is "hurting people and didn't want to." App. 46. But once Francis "thought about making a phone call," he explained that he "couldn't resist." *Ibid.* "Part of my mind was saying, 'Stop.'" *Ibid.* Francis explained at other points that "once I got the idea in my head, I couldn't help it. ... I would feel a pressure mounting. I tried to fight it off, but it was more and more intense. I'd tell myself, 'Don't touch the phone,' but I couldn't stop." App. 46–47. Again, in Francis's own words: "Once the idea of calling entered my thoughts, I couldn't control my impulses." App. 47.[9]

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[9] Francis, at the hearing, testified that he now felt remorse for the phone calls and did not feel any present need to engage in them. App. 519. Of course, he has expressed remorse for the phone calls throughout, and has (as he said) never actually wanted to engage in the calls. Paraphilia is a "lifelong and chronic" condition, App. 66, and the distinguishing characteristic of any volitional impairment is that its symptoms may manifest *despite* the fact that its sufferer would rather control himself.

Francis has also had a six-month period of supervised release during which he is not known to have made any further obscene phone calls. App. 539. But as the government's expert testified (without contradiction), there is no empirically validated study that indicates a six-month period is sufficient to conclude that a disease has been eliminated. App. 315 ("All of the studies in this area employ follow-up periods of several years; five years, ten years."). Moreover, Francis has had prior periods of comparable length during which he did not make obscene phone calls, only to return to the behavior again in times of stress. App. 314–15. As Dr. Malinek testified, this pattern is common for paraphiliacs; the disease may not manifest every day, but may lie dormant until periods of stress or anxiety. App. 314. This is consistent with Francis's testimony, as well. App. 145–46 ("So it was really at times of an emotional release, when there was some—what I considered stressors on me. And that's when the threats came out.").

No more than this is required. Francis's paraphilia is a serious mental disease, and he has persuasively explained the ways in which it affects his volition in times of stress. The Court rejected the argument in *Crane* that a person may be committed "without *any* lack-of-control determination." 534 U.S. at 412. But where, as here, there is a "serious lack of ability to control behavior," that is sufficient. Whether a disease impairs a person's ability to control his behavior will "not be demonstrable with mathematical precision"; instead, "when viewed in light of such features of the case as the nature of the psychiatric diagnosis," the evidence must be "sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *Id.* at 413.

The district court offered no support for its statement that "there is at least a question as to whether [the paraphilia diagnosis] remains an accurate" one. App. 538–39. (Francis's proposed findings quote the statement in Dr. Plaud's expert report that cast some doubt on his diagnosis, but the findings do not mention or take into account Plaud's statements at the hearing that specifically confirmed the paraphilia diagnosis when he was questioned. App. 390.) Instead, the district court simply stated that Francis "would not have serious difficulty refraining from sexually violent conduct if released." App. 539. As noted above, that is inconsistent with Francis's own reports of how his disease affects him; moreover, and more importantly, a court

cannot properly evaluate a whether a person's mental illness affects his volition without deciding whether and to what extent that person is ill.

For that very reason, the Supreme Court, when evaluating state commitment schemes, has always described a person's volitional impairment as a symptom of, and closely related to, their mental illness. In announcing the volitional impairment requirement in *Kansas v. Crane*, the Court held that "there must be proof of serious difficulty in controlling behavior," but this was to be "viewed *in light of* such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself." *Crane*, 534 U.S. at 413 (emphasis added). The end goal, held the Court, was to "to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *Ibid.* A statute may not, in other words, make eligibility for civil commitment turn on an abstract evaluation of recidivism risk: rather, the question is always whether a person is ill and if so, how that illness affects them.

The district court did the opposite here: rather than viewing ability to control behavior "in light of" the unanimous diagnosis of paraphilia, the district court focused on the question of recidivism risk in the abstract. This was also the tack taken by Francis's proposed findings, which the district court adopted, and which state that "in addition to volitional impairment, the Government must prove by clear

and convincing evidence that Respondent poses a risk of re-offense that is significant enough to justify finding that Respondent is sexually dangerous and therefore can be preventively detained." App. 532. The Supreme Court has never imposed, above and beyond a lack-of-control requirement, a rule requiring any particular likelihood of reoffense; indeed, the Court has repeatedly urged that civil commitment statutes *not* turn into general schemes for committing criminal recidivists.

Evaluation of recidivism risk may be circumstantially relevant, but only insofar as that risk sheds light on the nature of a respondent's disease. Neither the Act nor *Crane* require a showing that a person will reoffend—nor do either permit commitment based upon such a showing. See also *Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring) ("We should bear in mind that while incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone."). A finding that a person is likely to offend again is neither necessary nor sufficient for civil commitment. Rather, the Act calls for an evaluation of the person's illness, and whether its symptoms impair their volition in the required way. See *United States v. Hunt*, 643 F. Supp. 2d 161, 180 (D. Mass. 2009) (the "ultimate question called for by the Act concerns the self-control of an individual, not the statistical rearrest patterns of a given population"); *United States v. Carta*, 2011 WL 2680734, at *22 (D. Mass. July 7, 2011) ("The government need not establish that the person it seeks to commit will,

or even is likely to, reoffend."). The district court's approach to this question was legally flawed, and its findings are thus clearly erroneous.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typography and length requirements of Federal Rule of Appellate Procedure 32: it is 6,263 words long, and is set in a 14-point, proportional typeface.

/s/ Ian Samuel

CERTIFICATE OF SERVICE

On March 15, 2012, I served this brief using the CM/ECF system.

/s/ Ian Samuel